No. 2799.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Yee Chung,
Appellant,
vs.
United States of America,
Appellee.

BRIEF FOR APPELLEE.

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The appellant in this case filed on March 20, 1916, in the office of the United States District Court at Los Angeles, his assignment of errors, setting out seventeen (17) separate and distinct assignments of error [Tr. 305-318]. In writing their brief counsel for appellant ignored paragraph two, subdivision B, of rule 24 of the rules of this court in this, that they failed to set out the assignment or assignments of error to which the first 34 pages of their brief is directed. It would appear from their argument and statement of facts, and the rehearsal of testimony of the witnesses for appellant in the trial before the District Court, that counsel desired to direct the attention of the court to

their assignments of error based upon the insufficiency of the evidence to sustain the District Court in its findings and judgment, and the whole brief of appellant is taken up, with the exception of the last two pages, in dealing with the alleged insufficiency of evidence to warrant the deportation of the appellant. On pages 34 and 35 of the brief of the appellant counsel specifically direct the attention of the court to assignments of error Nos. 9 and 10. Owing to the manner in which the brief is arranged, it is rather difficult to answer the same in a logical and orderly manner. However, we will take up in the order in which the same are argued in appellant's brief, 1st, the argument on the insufficiency of evidence; second, assignment of error No. 9; third. assignment of error No. 10.

STATEMENT OF FACTS.

Yee Chung, the appellant, was arrested at the River Station in the city of Los Angeles, state of California, on July 14, 1914, at 4:00 p. m., by Immigrant Inspector W. A. Brazie. He was sitting in the station alone [Tr. 18]. Upon his arrest, appellant stated that he was born in this country and wanted to go to San Francisco [U. S. Exhibit No. 2, Tr. 269]. The next train for San Francisco after 4:00 p. m. leaving the River Station where appellant was arrested was at 7:30 p. m. [Tr. 254]. Appellant was immediately taken, upon his arrest, to the United States Immigration Office in the Federal Building, Los Angeles, and questioned concerning his right to be in the United States, and a statement taken from him, which state-

ment was introduced in evidence as United States Exhibit No. 2, and is set out at length in the Transcript on page 268 *et seq.* Appellant in this statement refused to answer the questions put to him in a frank and straightforward manner, but repeatedly said that he did not want to talk. He said he had a native paper of some kind that was kept in San Francisco, but he did not know who had it; that he was born in San Francisco and that he got his native paper in San Francisco; that he had made a trip to China but did not know when he returned, and he further stated that he had not shown this native paper to anyone when he landed from his trip to China. He was asked the question:

Q. Have you any papers to produce showing your right to remain in the United States? A. No.

He further stated in this statement that he was a laundryman. Thereafter appellant was arrested upon a warrant set out in Transcript on pages 4 and 5 and given a hearing before the United States Commissioner, which resulted in an order of deportation being entered against him.

A very large part of the somewhat lengthy transcript is taken up with arguments by counsel on the respective sides over the admission of evidence, a great deal of which the court in an effort to expedite the trial admitted, although the court repeatedly stated that it was of no value and would not be considered in arriving at a conclusion in the case. It was stipulated by the United States attorney that appellant had several times been re-admitted to the United States by

officers in the Immigration Department, but, as was said by the trial judge [Tr. 94], "Much of this matter that has come in today appears to me to be incompetent, but no objection was made by the Government. Whether this man has passed through the barriers 3 or 4 or 5 or 6 times is immaterial. The question is, is he a native born citizen. What somebody else may have done or thought or said is immaterial at this time." It is true that appellant was successful in several times passing through the "barriers," as the trial judge called the examinations by the inspectors, but it is also true that when appellant applied for a pre-investigation of his status before making a trip to China in 1914 he was denied a return certificate, and such denial was upheld by the Secretary of Labor [Tr. 91 to 100]. This refusal of a return certificate by the Department will hereafter be referred to, not as of itself showing whether or not the appellant was born in the United States, but only as touching his veracity.

There are two separate and distinct issues involved in this case: 1st, appellant tried to establish that he was the identical Yee Chung discharged by Commissioner George E. Johnson at Burlington, Vermont, on the 28th day of December, 1897, as set out in the proceedings introduced in evidence as United States Exhibit No. 2 [Transcript 257]; 2nd, appellant endeavored to establish his nativity by witnesses independent of the claim that he had originally been discharged by the Commissioner at Burlington, Vermont, as a native.

ARGUMENT.

I.

Sufficiency of the Evidence.

Under this head we will first take up the sufficiency of the evidence from the point of view that the Yee Chung who is the appellant in this case is not the Yee Chung who was discharged by the Commissioner at Burlington, Vermont. When the appellant was arrested at River Station in Los Angeles he claimed to be a native of the United States, born in San Francisco, and to have what he called a native paper. When asked where he got the native paper he stated that he got it in San Francisco [U. S. Exhibit No. 2, Tr. 270]. In the trial of this case, before the Commissioner and before the District Court, the appellant introduced what is now called Defendant's Exhibit No. 3, set out in the Transcript on page 280 *et seq.*, which exhibit includes a certified copy of the order of discharge made by the Commissioner at Burlington, Vermont, discharging a Yee Chung from custody, and which exhibit also contained a picture of the appellant, but the appellant himself testified that the picture which is attached to this exhibit was placed upon it at Carnegie, Pennsylvania, by the Presbyterian preacher at that place, and not by the Commissioner at the time he certified to the copy of the record, and appellant was not before the Commissioner at the time he so certified [Tr. 32, 33 and 45], and there was no picture attached to the Commissioner's docket [Tr. 298]. In this connection we desire to call the court's attention

to United States Exhibit No. 2, Transcript 257 *et seq.*, and defendant's Exhibit No. 3, Transcript 280 *et seq.* From a reading of these it will appear that the Commissioner at Burlington, Vermont, did not state what the ground of discharge was upon which he discharged a Chinaman by the name of Yee Chung on the 28th day of December, 1897, nor can it be ascertained from any of the evidence or exhibits filed in this case upon what ground he discharged a Yee Chung. On page 260 *et seq.* of the transcript appears a transcript of the Commissioner's docket in the said case, but it fails to disclose the ground upon which Yee Chung was discharged, and it appears that no picture is attached to the docket in this case. Therefore, it would appear to counsel for appellee that had appellant been able to show that he was the same Yee Chung who was discharged by the Commissioner in Vermont, which he absolutely failed to do, he would not be entitled to his discharge at this time upon that ground, for it might be that the Yee Chung discharged by Commissioner Johnson was discharged on a motion of the United States attorney or someone representing his office, and not on a judgment rendered on the evidence submitted, and inasmuch as the record of the Commissioner at Burlington, Vermont, failed to disclose upon what ground the defendant was released, we fail to comprehend how counsel arrive at their positive statement that the Yee Chung who was discharged by the Commissioner at Burlington was discharged as a native of the United States. There is as much gound to assert that he was discharged as a merchant

or as a laborer with a proper return certificate as there is that he was discharged as a native, and, therefore, we repeat that in the absence of any knowledge whatsoever as to the ground of said discharge, had this appellant been able to establish his identity with the Yee Chung discharged by the Commissioner at Burlington, still that would not act as an estoppel of the action before the Commissioner and District Court at Los Angeles to determine the present right of this appellant to be and remain in the United States, and such being the case we do not believe that this court will feel called upon to pass upon the point as to whether a discharge by a United States Commissioner on the ground of nativity is a bar to subsequent proceedings against the same defendant in a separate jurisdiction.

However, granting, for the purpose of argument, that the Vermont Yee Chung was discharged as a native, we will now consider the evidence which appellant introduced to establish his identity with the said Yee Chung so discharged in Vermont. Defendant produces the record [defendant's Exhibit No. 3, Tr. 280], with his own statement that he is the identical Yee Chung mentioned in the discharge, and no further testimony is offered by him in support of that position. Appellant stated that he arrived at Vancouver, B. C., about December, 1897, on the steamer Empress of Japan [Tr. 52], and went from there to Montreal and from Montreal to Burlington, where he was arrested, consuming in all six weeks on his trip. In the examination of this appellant before the United States

Commissioner he stated [Tr. 245] that after landing from the "Emperor of Japan" that he then took the rail direct to Burlington, Vermont, which shows a wide discrepancy in the description of the trip as given by the appellant upon the two different occasions. The United States called as a witness one Arthur Leigh Jolliffe [Tr. 136 *et seq.*], who was an Immigration Agent and Controller of Chinese Immigration in British Columbia. This witness produced the manifests of the ship Empress of Japan, showing that the said ship Empress of Japan arrived in Vancouver, B. C., October 20, 1897, and not again until January 12, 1898. It is a peculiar thing that appellant remembers all of the other dates connected with his alleged nativity so vividly and yet he cannot tell the date upon which he arrived nor can he give the date when he alleged he was arrested and tried before Commissioner Johnson of Vermont. He stated that he thought it was in December, 1897, when he landed at Vancouver, but there was no ship Empress of Japan arriving at Vancouver in December, 1897. The Yee Chung who was arrested in Burlington, Vermont, was arrested upon January 3, 1898, and, therefore, it would have been impossible for him to have arrived upon the steamer landing at Vancouver January 12, 1898. Mr. Jolliffe produced the manifest of both of these trips and at no place in the manifests was there a Yee Chung answering to the description of the appellant in this case. Appellant was at that time 18 years of age. The two Yee Chungs who landed upon the Empress of Japan on October 20, 1897, were respectively 33 and

38 years of age, and the physical description of neither fits this appellant [Tr. 139-141], and one of these Yee Chungs was routed to Mansonville. Mansonville is a city in Canada very close to the Vermont line. This Yee Chung, who was routed to Mansonville was a merchant, as shown by the manifest, and in all probability he is the Yee Chung who was examined by the Commissioner at Burlington and released as a merchant. The appellant introduced testimony by the witness Yee Foo [Tr. 190] to show that since the passing of the immigration laws, Chinamen booked for America must give their names to the steamship company. It will be remembered that the arrest of this appellant was a number of years subsequent to the passing of the Chinese Exclusion Laws and therefore since the appellant introduced such testimony by his own witness, it is a reasonable presumption that had he been on the ship which he stated he arrived on his name and description would have appeared on the manifest according to the custom described by his witness. The court undertook to discover from the appellant [Tr. 239 to 243] whether or not his name was given at the time he alleges he arrived or took passage on the Empress of Japan, and at first the appellant declared that he gave his right name as Yee Chung and later denied that he was asked his name. This is a fair sample of the testimony of this appellant throughout his trial. At one time he makes one statement and at another time he makes a totally different statement. Upon the very point as to whether he is the same Yee Chung discharged by the Commissioner

at Vermont, we have already called the court's attention to the fact that there is a wide discrepancy in his description of the trip from Vancouver to Vermont as given by him before the United States Commissioner and before the District Court. Affirmative testimony was introduced to show that the testimony was false relative to his arrival on the Empress of Japan and appellant gave other testimony of a conclusive nature that he is not the Yee Chung who appeared before the Vermont Commissioner in that he was unable to correctly describe the Commissioner. His description of the Commissioner appears in Transcript, page 74, and on page 76 he admitted that he had described the man as a big man before the Commissioner in his examination in Los Angeles. Inspector Mayer described the Commissioner, having had a long and personal acquaintance with him, on page 157 *et seq.*, and the court will readily see that the two descriptions are widely different. Counsel for appellant state in their brief, page 30, that this discrepancy was due to the lapse of 37 years from the time appellant saw the Commissioner until he was arrested in Los Angeles, but as a matter of fact it was only about 16 years from the time he alleges he was discharged in Vermont until his arrest in Los Angeles. Counsel for appellant seems to make a great effort to convince the court that Inspector Mayer's testimony is not to be relied upon because he had before accepted the same description that Yee Chung, the appellant, gave of Commissioner Johnson, and passed upon it at the time his two sons were admitted and upon the return of Yee Chung, the appel-

lant, to the United States in 1909, but a reading of the transcript will readily disclose that Mayer at those times was impressed with the difference in the description given by Yee Chung of Commissioner Johnson and Commissioner Johnson as he knew him, but there being no other facts presented to Mayer at the time he passed the appellant Yee Chung and his sons through the Immigration Department at San Francisco he did not rely too strongly upon the discrepancy in the description of Commissioner Johnson, but in the light of the facts as developed in this case the discrepancy in the description assumes an important place in a chain of circumstances all tending to show that the appellant is not the Yee Chung discharged by the Commissioner in Vermont. Appellant even is unable to state the length of time he remained in jail in Vermont as the same upon two different occasions. In transcript, page 72, he states that he was shut up for several days; transcript, pages 245 and 246, he states that after he was arrested and charged, his father arrived the next day and bailed him out. On page 67 of the transcript he said he bought a ticket from Hong Kong to Montreal and that his father sent him a ticket from Montreal to Boston, and that he had to remain in Montreal for a period of five or six days waiting for the ticket to come from his father in Boston. On pages 245 and 246 of the transcript he stated that he took the train direct from Vancouver to Burlington. The veracity of the appellant is further questioned when he was shown a picture set out in U. S. Exhibit No. 1, page 261 *et seq.* In the hearing before the Commissioner at Los Angeles he denied that the pic-

ture had any resemblance whatever to his father. When shown the same picture in the hearing before the District Court he stated that the picture did resemble his father. [Tr. 79 and 80.] This hesitancy of the defendant to testify absolutely as to whether or not the picture is that of his father is only another one of those circumstances pointing to fraud in that if he did positively identify a man as his father he would thereafter be tied up to that statement, but by quibbling about it no definite statement can be laid at his door and impeachment is not possible. It appears to us that a man either knows or does not know whether a picture is that of his father, and the quibbling of the defendant about this matter simply aggravated the suspicion that he was not telling the truth and dare not commit himself to any sworn statement.

II.

We now come to the consideration of counsel's argument that appellant abundantly proved his nativity separate and apart from his claim that he was the Yee Chung discharged by the Commissioner in Vermont. In approaching this argument it will be well to remember that the conduct of appellant, his testimony, and the contradictions in his testimony and the affirmative proof of the Government that he was not the Yee Chung discharged by the Commissioner in Vermont, would engender in the mind of any impartial man the suspicion that the appellant, in the common vernacular of the street, had attempted to put something over and had failed, and having failed absolutely and positively to make good his claim that he was the Yee

Chung discharged by the Commissioner in Vermont, his testimony and that of his witnesses thereafter was by the District Court and Commissioner at Los Angeles, and of a right should be, viewed with the most extreme caution and suspicion. His mere claim to nativity in no wise shifted the burden of proof from the appellant to the Government (186 U. S. 200, 227 Fed. 131, 227 Fed. 209). Now the Chinese Exclusion Law provides that in the trial of a Chinaman alleged to be unlawfully in the United States, the burden of proof is upon him to show his right to be in the United States, and he shall be adjudged to be unlawfully within the United States unless he shall establish by affirmative proof to the satisfaction of the justice, judge or commissioner before whom he is being tried, his legal right to remain in the United States. (Sec. 3 of the Act of May 5, 1892). The learned trial judge in a case decided by him in January, 1915, entitled "The United States of America v Gee Jan, No. 858 Crim., in the Southern Division of the Southern District of California," had occasion to discuss at some length the credibility to be given Chinese testimony in a deportation case and the meaning of the term in the Chinese Exclusion Law "to the satisfaction of the justice, judge or commissioner":

> "The Court: In a case of this character the statute requires that the defendant shall produce such evidence as will establish, by proof satisfactory to the court, the right of such defendant to remain in this country.
>
> " 'Satisfactory evidence,' as defined by the California Code, as I remember it now, is that evidence which produces conviction in the mind of

an unprejudiced person inquiring for the truth—or something to that effect. It does not approximate, I should say, the proof required in a criminal case, because the presumption that a defendant is free from guilt is the strongest presumption known to the law; no such presumption as that could arise in one of these cases, and consequently no such evidence as that required to overcome the presumption of innocence should be required here. But upon the whole evidence the court must be satisfied that the right of an alien to remain in this country has been established by affirmative evidence introduced in his behalf.

"On the other hand, for the court to be so satisfied it will not be sufficient, in my judgment, merely that a preponderance of the evidence has been introduced by the defendant; that would not make it measure up to the standard required by the statute. A civil case must be decided as between the contending parties purely and simply upon the preponderance of evidence, simply because a case has to be decided one way or the other, and if the plaintiff, in ordinary cases at least, does not make out his case by a preponderance of the evidence, the other side is entitled to the decision; the court awards a judgment upon the basis of whether or not the prepondance of the evidence has been adduced by the one holding the affirmative of the issue. To hold that the alleged alien may merely present a preponderance of the evidence to the effect that he is entitled to remain would seem to me to leave out of consideration, to a great extent at least, the requirement of the statute that the court shall be 'satisfied', because much more than a preponderance of the evidence might be required to

satisfy the court of the truth or falsity of a given claim or contention. I think the true path rather lies between the two referred to, and the court ought to be able to say that it has been established to it's satisfaction, that is, to such an extent that the court believes from a fair consideration of the whole matter that the contention as made by the defense has been established—that conviction has been produced in its mind: and unless a different construction is announced by some tribunal that this court is bound to follow, that will be the construction placed by this court upon the face of the statute—and I expect to have a good many of these cases before I get through.

"In this connection I am perfectly free to admit that with me there is always a good deal of dubiousness about the testimony of Chinamen in any case. Experience has shown that many of them have little if any regard for an oath administered to them in a court of justice in our country; and experience has shown that Chinese, in their relations among themselves and for the purpose of protecting one another in various ways and exigencies, think it is not at all beyond their province to color, if not actually to manufacture, their testimony in that a given end may be accomplished thereby, and the mere fact that a Chinaman testifies to a thing does not, in my mind, because of my experience in such matters, prove to me that the fact is as testified to. It needs to be measured with the probabilities and improbabilities: it needs to be considered in relation to the interest of the Chinaman thus to testify and the reasons why it might be to his interest to testify one way as opposed to another—all of

the time taking into consideration the fact, which I believe to exist, as it is commonly known and understood among those whose duty it is to administer and construe the laws and who have to do with courts of justice, that the Chinese, as a race, when called upon in a matter in which Chinese are vitally interested, are disposed to be very free in their statements upon the witness stand.

"Furthermore, I am frank to say that I am not particularly in sympathy with this deportation act so far as my individual judgment is concerned. I think the Chinese are one of the best classes of people among the foreigners we have here, and I have very little sympathy with the law enacted here to drive them out of the country, unless it should appear that they were coming into the country in such numbers as to become a menace to our peace of mind and happiness and to interfere with the ability of the proper citizens and residents of this country to work out their own destiny unaided by aliens. The Chinese, so far as my experience has gone, are good laborers, and they do mind their own business, and ordinarily they fill a very proper niche in our social and political economy, and I have no particular sympathy at all with the law which seeks to drive Chinamen away who are unoffensive and mind their own business and who are performing their daily tasks in their own way; so that I know that I am not possessed or afflicted with any prejudice in respect to the Chinese as a race.

"Now, in this case the court will, in furtherance of what it conceives to be its duty, affirm the judgment of deportation, and will do so in any case unless the alleged alien has, by evidence introduced on his own behalf, satisfied the court that he has a right to remain here.

"This court is not going to rest its judgment upon any preponderance of evidence, or anything of that sort; neither is it going to say that the defendant must prove his case beyond a reasonable doubt; but he must satisfy the court that his contention is a righteous one, and in order to do so the court will require that he shall make a case by the affirmative testimony of competent witnesses who are believable by the court—and the court will always presume that every witness will tell the truth. The evidence of such witnesses must be free from colorable doubt or suspicion and free from the charge that it is perjured or counterfeited or made up for the particular occasion; and in this case or any other case if there be in the evidence circumstances that are of a vitally suspicious nature, or statements, of whatsoever sort or character, of such improbability as will lead the court to believe that the case has been made up, rather than a presentation of the facts as they actually exist, the court will feel that satisfactory proof has not been made and that the order of deportation should be affirmed. In every instance I want it clearly understood that if the record as presented shows the existence of those things that cause a reasonable man to doubt the truth of the contention sought to be established, this court will adjudge that the burden cast upon the defendant has not been met."

We believe that counsel for appellant have relied too much on their statement of facts, and the testimony of witnesses who, as Justice Field in the Chinese Exclusion case (130 U. S., 581-598), says entertain "loose notions of the obligation of an oath." We therefore respectfully suggest and expect that

this court will examine the testimony of the witnesses for the appellant in the same calm judicial manner in which the trial judge listened to their testimony and weigh it in the same manner and under the same rules which the learned trial judge applied to their testimony.

It is well to suggest at this point a theory which was advanced before the trial judge in the argument at the close of the evidence as to the reason why this appellant was taken into custody and why he desired a judicial expression of his nativity. The court's attention has heretofore been called to the fact that in March, 1914, at San Francisco, California, this appellant made an application to the Immigration Bureau for what is called a "pre-investigation." In other words, he submitted proof to the immigration officials at San Francisco to establish his nativity, and thus secure what is called in the Chinese Exclusion Law a return certificate entitling him to readmission to the United States after a visit to China. He was refused such a return certificate upon the evidence which he submitted and such refusal was upheld by the Secretary of Labor; therefore this appellant was unable to make the contemplated visit to China with a guaranty that he would be readmitted into the United States. Some time later, to-wit, on the 14th day of July, 1914, this appellant was discovered in the River Station in the city of Los Angeles at 4 o'clock in the afternoon, where he said that he was waiting for a train to take him to San Francisco, although the next train did not leave River Station until 7:30 p. m. for San Francisco. It is believed that the inference is very

clear that this man planted himself at River Station in Los Angeles and had a confederate notify the immigration officials so that he would be arrested and he would have an opportunity to judicially establish his nativity if possible.

We wish further to call the court's attention to the allegations made by this defendant as to his nativity. In any other class of cases such allegations would be of the most extraordinary kind and would test the credulity of the most open-minded man. How much more, therefore, would such allegations test the credulity of the court when made by a Chinese who, as Justice Fields has so well expressed it, "entertains such loose notions of the obligations of an oath." This appellant declares that he was born in San Francisco about 1880 or 1881, and at the tender age of two years was taken to China by his father, who was a merchant in the United States, and left there, and his father thereupon returned to the United States, and father and son did not meet again until sixteen years after. At the time of the hearing before the Commissioner here the father and mother are conveniently located in China, where they cannot appear to testify in favor of appellant, nor can they be produced on behalf of the Government. The great weight and importance that Chinese place upon raising their children in America and having them enjoy the benefits of citizenship in the United States and of the wider commercial activities in the United States is so notorious that the bare suggestion that a Chinese merchant residing in the United States almost continuously since 1877 up to the time at which this appellant reached

his majority should make a trip to China for no other expressed purpose than to take his young son, two years old, and his wife there and leave them there, is such an extraordinary allegation as to immediately raise in the mind of any person a suspicion that such a circumstance could not have taken place. This court is so familiar with Chinese deportation cases that it will readily recognize this case as one of a large number in which an alien alleges birth in this country but is removed at a very early age to China, where he attains his majority, and then seeks to re-enter the United States as a native. The court will also recognize the oft-used subterfuge that the father and mother of appellant are in China at the present time and so are unable to appear and give testimony in behalf of the alleged son. The court will also bear in mind that, inasmuch as Chinese witnesses invariably testify through an interpreter and testify to a statement of facts which the Government is powerless to disprove by affirmative testimony other than that introduced in their own statements, and previous statements of the witnesses, and the like, therefore such Chinese witnesses are immune to any prosecution on the grounds of perjury, and so the fear of prosecution for perjury does not enter into the question of a Chinese giving testimony in behalf of his countrymen.

Counsel for appellant argues that this case is one in which the most serious consequences will result if this appellant is not declared to be a native, but we do not believe that this court will be influenced by the result that may attach to the judgment. We

are interested in one question only, and that is whether or not this man has established his nativity, and be the consequences what they may, we believe that the court will not take this into consideration; and, as far as that is concerned, the consequences to the Government are as grave as they are to the alien, as a recognition of his citizenship would mean that he could bring his entire family into the United States and thus avoid the purpose of the Chinese exclusion laws to prohibit laborers from entering the United States.

We will now call the court's attention to the character of the witnesses which the appellant produced on his own behalf. Counsel for appellant argued that these men are men of tremendous financial ability and they pay to the United States Government thousands of dollars yearly in revenue, but we do not see that this gets to the gist of the matter, and believe that this court will only be influenced by those matters which bear upon the case and not by all of the extra judicial statements of the counsel or the witnesses. Counsel for the appellant called six Chinese as witnesses to prove the nativity of the appellant. By name they are Yee Ying Dock, Lee Leung, Wong Chung, Yee Foo, Yee Hing Woo, and Yee Shun Chung. It will be seen that four of these witnesses are Yee men, or men belonging to the same clan as appellant; that one is a Wong man, and he testified that [Tr. 173] appellant's mother and he belong to the same clan, so that leaves but one witness, Lee Leung, who is not a relative of this appellant.

In March, 1914, when this appellant applied for a

preinvestigation, he testified [Tr. 229] that he had no witnesses who could testify as to his nativity, and he was at San Francisco where all seven of the witnesses now produced reside, every one of whom testified that he had seen the appellant repeatedly there and up to very recently, and knew him to be the Yee Chung who was a native of San Francisco and a son of Yee Kim Sing. Now, if this be the case and these witnesses are telling the truth, how does it happen that Yee Chung at a time when he was not under restraint, and at a time when he was living in San Francisco, where all seven of these men reside, could not produce them at the Immigration Office to testify in this preinvestigation hearing and yet could produce them in Los Angeles at a later date in the same year? Also when he was examined before the immigation officials in Los Angeles after his arrest, he did not give the names of any of these witnesses who could testify as to his nativity [Tr. 268 *et seq.*]. Truth is the most spontaneous thing in the world and the easiest thing in the world to tell. Now, if this defendant knew of these witnesses, and they knew him, why would he not say so on these two occasions? Having denied that he had any witnesses, it must be taken for a fact that he did not know these witnesses at that time, and that these witnesses were procured to so testify subsequent to the preinvestigation hearing and the arrest and hearing in Los Angeles. Thus the defendant added one more suspicious circumstance to the long chain of suspicious circumstances surrounding his claim of nativity, and his claim that he is the same Yee Chung who was discharged by the Commissioner

in Vermont. Therefore the appellant having shown himself to be utterly unreliable and having uttered numerous contradictory and false statements, there is certainly no great weight to be given to the testimony of witnesses whom he subsequently procured to testify in his behalf. Surely such testimony cannot be said to be free from suspicion, and not being free from suspicion cannot produce that satisfaction in the mind of the court which is required by the Chinese Exclusion Law. The trial judge in his conscientious manner applied to the defendant's witnesses all of the tests prescribed by law, and was able, in addition to what this court can do, to judge from their personal appearance and their actions upon the witness stand as to whether they were telling the truth, and we do not believe that this court will now undertake to negative the findings of the lower court on a question of fact, where the trial judge was in a much better position to judge the veracity of the witnesses than this court can possibly be.

Counsel for appellant bases a long argument upon the fact that Wong Chung, one of the witnesses for appellant, was a servant in the household of Commissioner Backus in San Francisco, but we do not see that this adds anything to the weight of his testimony and was simply an attempt on the part of counsel to influence the lower court in attaching undue importance to the testimony of Wong Chung by reason of his services in the household of Commissioner Backus. Likewise great stress is placed upon the testimony of one James H. Clark, a witness for appellant, but the most that can be said for his testimony is

that he saw a woman in a store where Yee Kim Sing, the alleged father of Yee Chung, worked, and supposed that she was the wife of Yee Kim Sing. Now, this case is not to be decided upon supposition and such testimony as this. Clark further testified that he has been a witness for numerous Chinese in cases before the Department of Immigration, and that his entire living is made in Chinatown and derived from Chinese. Therefore, it is easy to see that this man would not be above suspicion, and even were he above suspicion, his testimony does not prove, or even tend to prove, the nativity of this appellant, as the lapse of some thirty odd years between the birth of this appellant and his next seeing him is such a lapse of time as would tax the credulity of the most credulous in believing that he could identify this appellant or in any wise connect him with a child born in 1880 to the wife of Yee Kim Sing in San Francisco, if such child were actually born.

Assignment of Error No. 9.

We presume that the counsel for appellant does not rely very strongly upon this assignment of error, as the only law he quotes is a section of the Civil Code of Procedure of the State of California, which is hardly applicable in the present circumstance. The testimony [Tr. 121 and 122] shows that counsel for appellant was endeavoring to introduce into the record the contents of letters not addressed to the witness, it not being shown that the letters were not in existence at the time of the trial, and there being no proof as to the identity of the writer of these letters,

and such evidence was clearly hearsay and incompetent and illegal and immaterial, and the trial court was correct in his refusal to admit into the record this hearsay evidence.

ASSIGNMENT OF ERROR NO. 10.

This assignment has to do with the admission of a photograph into the record. It is not to be believed that the learned trial judge would in any manner be influenced in his decision by any matter which was attached to the photograph, but which was not admitted in evidence even though the court in examining the records should read the extraneous matter attached to the photograph, and the photograph was clearly a competent piece of evidence as tending to discredit the testimony of Yee Chung, and to show the difficulty of getting this appellant to commit himself to any definite statement in any phase of the proceedings. And we do not believe that the photograph itself is an *ex parte* declaration as alleged by counsel. The statements attached to the photograph were certainly *ex parte* and were not considered by the court, but the photograph itself was a competent piece of evidence, and that was all that was considered by the court. The fact that attached to the photograph and admitted in evidence were reports showing that this man whose photograph was introduced left the United States would have no important bearing on the case, as the Government was unable under the rulings of the court to introduce further testimony to make it of value, but that much of it was certainly a competent

record and admissible under proper certification under section 882 of the Revised Statutes of the United States.

Legal Argument.

We are not going to take issue with counsel in their statement that if appellant was born in the United States and is an American citizen, he is entitled to the protection of its laws. This is such a self evident fact it needs no argument in its behalf, but there is a wide difference between a man being a citizen of the United States and in claiming that he is a citizen; and a Chinese found laboring in the United States without a proper certificate must establish his right to be here to the satisfaction of the court by affiramtive proof, even though he does claim that he is a citizen of the United States. See Chin Bak Kan v. United States, 186 U. S. 193, where the court says on page 200 as follows:

> "By the last the Chinese person must be adjudged unlawfully within the United States unless he 'shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States.' As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to

avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed."

Also see *ex parte* Chin Him, 227 Fed. 131, and Hoey Ay Sing v. U. S. 227 Fed. 209, in which this question is discussed and in which the court in its opinion states:

"McPherson, Circuit Judge. In the first instance the proceeding in this case was before a United States commissioner under the Chinese Exclusion Acts. The commissioner ordered the appellant to be deported, and on appeal the District Court affirmed the order. Each tribunal heard and saw the witnesses, and their concurring judgment should not lightly be disturbed. The act of Congress puts the burden on the Chinese person of proving his right to be in the country—in this case, his citizenship—and after carefully reading all the evidence we see no reason to disagree with the conclusion of the commissioner and the court below that the appellant's birth in this country has not been established. United States v. Hom Lin (C. C. A. 2d Cir.), 223 Fed. 520; Fong Ping Ngar v. United States (C. C. A. 2d Cir.), 223 Fed. 523."

In the two cases cited above, United States v. Hom Lim, 223 Fed. 520; Fong Ping Ngar, 223 Fed. 523, the Circuit Court of Appeals in the Second Circuit holds that the courts below, having much better opportunity of hearing and examining witnesses, their judgment as to the weight to be given to the testimony of each witness will not be overturned on appeal.

In conclusion we would urge that the court consider with great care the memorandum opinion of the district judge set out on page 9, *et seq.*, of the transcript. As has heretofore been mentioned, both the commissioner and the trial judge had an opportunity to examine the witnesses in person, and they were therefore in much better position to judge as to their veracity than can one who has not seen them in person. The Supreme Court, in the case of Quock Sing v. United States, 140 U. S. 417, said that "the uncontradicted evidence of interested witnesses as to improbable facts does not require judgment to be rendered accordingly," and this point of view was adopted in the case of Yee Sing Far v. United States, 231 Fed. 948, in which the court said:

> "Appellant's claim to remain in this country is based upon his own testimony and that of Mary J. Matthews and two Chinese persons. The testimony introduced was insufficient to satisfy the commissioner and the district judge that the appellant was entitled to remain in this country. We think we would not be justified in overruling their judgment.
>
> "The question was one of fact and even if we might have reached a different conclusion if we had heard the testimony in the first instance, the assumption furnishes no reason for a reversal. We cannot say that the finding of the commissioner and the district judge is so contrary to the evidence as to justify us in setting it aside."

This is a case wherein counsel for appellant base their hope of a reversal upon the evidence and the evidence alone, and we do not believe that this court will reverse the District Court and the commissioner upon a case so fraught with impossibilities, improbabilities and contradictions as is this one, upon a question of fact.

Respectfully submitted.

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